IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 64902-7-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
GLEN A. LIVERMORE,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	
	)	FILED: July 6, 2010

Leach, J. — Glen Livermore appeals his conviction on multiple counts of child rape and child molestation, alleging intimidation of the venire caused by the court's comments, juror misconduct, prosecutorial misconduct, and the erroneous denial of his challenge of a juror for cause. In a statement of additional grounds, Livermore also claims that the court miscalculated his offender score.

We find no error. First, the court's comments to the venire were well within its discretion since the court did not admonish prospective jurors, and those jurors continued to express their potential biases after the court made its comments. Second, the court correctly determined that there was no misconduct by the presiding juror, who had cared for the deputy prosecutor's child on two or three occasions three years before the trial, because she truthfully answered all questions on voir dire and any comments she may have made to other jurors

during a break in deliberations did not bear on the central issues at trial. Third, the deputy prosecutor did not commit misconduct by failing to inform the court of this past child care connection since she had no reason to believe that the juror was biased. Fourth, the court did not abuse its discretion when it denied Livermore's challenge to another juror for cause because she testified that she could be impartial. Nor did this denial violate Livermore's state constitutional right to an impartial jury according to State v. Fire.[1] Finally, Livermore's challenge to the calculation of his offender score fails since he has not shown a sufficient basis to challenge the calculation.

FACTS

The State charged Livermore with three counts of first degree child rape, three counts of first degree child molestation, one count of third degree child rape, and one count of third degree child molestation. In his first trial, the jury was unable to reach an agreement on any count, so the court declared a mistrial.

Livermore's second trial commenced September 23, 2008. During voir dire, the trial court asked prospective jurors, "If you know the attorneys, the court staff, or me, raise your hand at this time." Twelve jurors, including Jennie McLean, raised their hands in response to this question. The court also asked prospective jurors, "Is there anyone here that knows right now that they could not be fair and impartial to both the State and Mr. Livermore in this case?" In

[1] 145 Wn.2d 152, 164-65, 34 P.3d 1218 (2001).

response, eleven jurors, including juror 25, raised their hands.

The deputy prosecutor directed follow-up questions to nine jurors who had indicated that they knew the court staff or attorneys involved. Juror 16 told the deputy prosecutor that the judge had presided over the trials of youths who had assaulted his stepson. Juror 16 also stated that the experience of going through the trial process with his stepson affected his ability to be impartial. Later, juror 25 informed the deputy prosecutor that she knew the judge from her child support case. She further explained that she could not be impartial because she had two small children. When asked if she could "listen fairly to decide the facts," she said she "could try." When one juror stated that she knew the deputy prosecutor, the deputy prosecutor immediately acknowledged that she knew that juror by a former name.[2] The deputy prosecutor did not ask McLean any follow-up questions.

Defense counsel asked the court to excuse juror 16 for cause based on his previous answers. This request prompted the following exchange between the court and juror 16:

> THE COURT: Okay. Let me give you a—a little of my thinking on the case like this. I—I heard you saying you felt it would be difficult to serve on this particular jury because of the nature of the charges. And I think a case like this, when the nature of the charges are difficult for everyone and—just like, you know, we've had cases where there's a murder for instance and everyone that serves on a jury in a murder case struggles with what happened. And obviously no one's for murder and no one's for a sexual assault, you know.

[2] Livermore later removed this juror using a peremptory challenge.

> So everyone generally—if it happened and these are allegations which have been denied and are at issue, I think the key is can you set aside the emotion part of it, which is difficult for everyone, and judge the case on the testimony and the facts? Because, you know, jurors are going to have to hear this case. Or is it some special reason why you think—you know, you told—told counsel I believe that you felt—you had granddaughters I think and that sort of thing, but I think everyone has granddaughters or sisters or wives or, you know, important females in their life. Is it a general concern or is it more specific than that?
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> JUROR 16: Probably more specific than it's supposed to, but a general concern. I just don't feel like I could be comfortable with sitting on a jury on this case.
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> THE COURT: All right. And don't think you could set aside—
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> JUROR 16: With—well, going through the assault with my stepson and it's an assault case, as far as I'm concerned I don't think I can be open minded enough to do the court any justice.
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> THE COURT: Okay. I'm going to excuse you because of what you went through with that.

Defense counsel next questioned juror 25, who restated that, as the mother of two children, she did not believe that she could be impartial. When defense counsel moved to excuse juror 25, the court questioned her and denied the motion. After retaining juror 25, the court excused several other jurors. Defense counsel later removed juror 25 using a peremptory challenge, exhausting Livermore's peremptory challenges before jury selection was complete. Defense counsel did not request additional challenges from the court. Nor did defense counsel ask McLean any questions. McLean was impaneled on the jury.

On September 24, 2008, the jury, with McLean as the presiding juror, found Livermore guilty of three counts of first degree child rape and three counts

of first degree child molestation.[3] The jury also returned a special verdict finding that the State had established aggravating factors.

On September 29, 2008, while Livermore's sentence was pending, the court sent a letter to counsel, stating that McLean "may have provided child care for [the deputy prosecutor] at some time." Defense counsel noted a hearing for a new trial.

At the hearing on November 3, 2008, McLean testified that she knew the deputy prosecutor because their children had attended the same day care for about one and one-half years, beginning in 2004. In 2005, McLean watched the deputy prosecutor's child on two or three occasions. On each occasion, McLean picked up the deputy prosecutor's son from the day care at 5:30 p.m. to avoid extra charges. She watched him for about 30 to 45 minutes until the deputy prosecutor arrived. No payment was involved, although the deputy prosecutor remembered giving McLean a $10 to $15 bottle of wine in return for the care.

McLean also testified that she had raised her hand to indicate that she knew the deputy prosecutor but had not affirmatively disclosed the details of her past connection because "I didn't feel it was relevant if it wasn't questioned by either side." She further stated, "If I had felt that there was any way that I could not perform my duties for any reason, I would have brought it up." When asked if she had discussed her past contact with the deputy prosecutor with the other

[3] The State elected to dismiss the count of third degree child rape and the count of third degree child molestation.

jurors, McLean said that she "possibly" mentioned it during deliberations. She could not recall any specific conversations but stated that the subject might have come up in a discussion about the jury selection process during a break—not during actual deliberations. When asked if she had shared any personal beliefs regarding the deputy prosecutor's character with the other jurors, McLean said, "Absolutely not. Because her character as a person has nothing to do with . . . what our job was."

Based on McLean's testimony, the court denied Livermore's motion for a new trial, finding no evidence of juror bias or misconduct. The court sentenced Livermore to three consecutive terms of 160 months.

ANALYSIS

Intimidation of Prospective Jurors by Court's Comments

Livermore contends that the court's comments "chilled the jury venire's responses to questions about bias." Specifically, he points to the court's colloquy with juror 16, who was excused for cause after the court questioned him about his experience with his stepson's assault trial, and to the court's comment to juror 25 that she would be excused if there was "something that would really affect you more so than the average juror."

Our courts presume that prospective jurors respond honestly to questions during voir dire about circumstances that might affect their ability to decide a case impartially.[4] But this presumption disappears when a trial court's remarks

[4] See United States v. Rowe, 106 F.3d 1226, 1229 (5th Cir.1997).

intimidate prospective jurors and "cut off meaningful responses to critical questions."[5] By stopping this "vital flow of information from venire to court," these comments deprive the defendant of an impartial jury trial and warrant a new trial.[6]

Livermore compares the court's comments to those that required a new trial in United States v. Rowe.[7] In Rowe, two prospective jurors responded affirmatively to the court's questions about bias. The court then accused them of refusing to follow instructions and attempting to avoid jury service and sanctioned them.[8] Thereafter, no juror responded when the court asked whether anyone else had potential biases or whether anyone had been intimidated.[9] Several weeks later, a member of the venire stated that she was prepared to testify that due to the court's admonishments she "felt like she had no recourse but to sit there and keep her mouth shut, and that was the best thing she could do."[10]

The trial court's comments here are neither similar in kind nor degree to those in Rowe. The judge did not admonish jurors for expressing their biases or suggest that they would be sanctioned for doing so. Nor did any juror indicate that he or she was intimidated by the court's remarks. In fact, after the

[5] Rowe, 106 F.3d at 1230.
[6] Rowe, 106 F.3d at 1230.
[7] 106 F.3d 1226 (5th Cir.1997).
[8] Rowe, 106 F.3d at 1227-28, 1230.
[9] Rowe, 106 F.3d at 1229.
[10] Rowe, 106 F.3d at 1229.

exchanges with jurors 16 and 25, several other jurors affirmatively expressed their potential biases. Thus, the trial court's comments did not deprive Livermore of a fair jury trial by preventing meaningful communication with prospective jurors.

Juror Misconduct

Livermore contends that juror McLean's withholding of information at voir dire and her injection of this information into deliberations constitute juror misconduct sufficient to warrant a new trial. To obtain a new trial based on juror nondisclosure, a party must show that the juror failed to honestly answer a material question during voir dire and that a truthful disclosure would have provided a basis for a challenge for cause.[11] A challenge for cause may be based on actual or implied bias.[12] A trial court's decision to deny a new trial will be disturbed only for a clear abuse of discretion.[13]

Livermore does not meet either requirement. As the trial court correctly noted, McLean did not fail to honestly answer a material question. She raised her hand when the court asked the jury venire, "If you know the attorneys, the court staff, or me, raise your hand at this time." Since counsel for the parties did not ask McLean any follow-up questions, she was not asked to and therefore did not provide any further information. A prospective juror is not obligated to volunteer information or provide answers to unasked questions.[14]

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[11] State v. Cho, 108 Wn. App. 315, 321, 30 P.3d 496 (2001).
[12] RCW 4.44.170(1), (2); RCW 4.44.180.
[13] Cho, 108 Wn. App. at 320.

Moreover, McLean's disclosure of her past connection with the deputy prosecutor would not have supported a challenge for cause because that information indicates neither actual nor implied bias. McLean testified that her past interaction with the deputy prosecutor did not affect her ability to decide the case impartially.[15] Based on her testimony, the trial court, which was in a better position to determine bias,[16] ruled that McLean was not biased. At most, the undisclosed information might have given Livermore reason to further question McLean during voir dire. However, as conceded during oral argument, counsel was not ineffective for failing to do so.

Livermore suggests that under State v. Cho[17] he "presented facts sufficient to conclusively establish Juror McLean's implied bias." "Where a juror's responses on voir dire do not demonstrate actual bias, in exceptional cases the courts will draw a conclusive presumption of implied bias from the juror's factual circumstances."[18] In Cho, a juror deliberately concealed that he was a retired police officer to increase the likelihood of being seated on the jury.[19] Cho's counsel submitted an affidavit, describing a posttrial conversation

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[14] Cho, 108 Wn. App. at 327.

[15] In determining whether actual bias exists, the question is whether a juror with preconceived ideas can "'put these notions aside and decide the case on the basis of the evidence given at the trial and the law as given him by the court.'" State v. Gosser, 33 Wn. App. 428, 433, 656 P.2d 514 (1982) (quoting State v. White, 60 Wn.2d 551, 569, 374 P.2d 942 (1962)); State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991).

[16] Noltie, 116 Wn.2d at 839.

[17] 108 Wn. App. 315, 30 P.3d 496 (2001).

[18] Cho, 108 Wn. App. at 325.

[19] Cho, 108 Wn. App. at 328.

in which the juror reported that he "was surprised to have made it on the jury" because, as a former police officer, he had always been excluded from juries.[20] From this affidavit, the Cho court stated that "an inference arises that juror number eight wanted to serve on the jury and realized that his chances of doing so would be greatly reduced if he disclosed that he had formerly been a police officer."[21] The Cho court also pointed to the juror's answers on voir dire, in which he responded only to questions regarding his negative experiences with the police, as opposed to positive experiences. The court observed, "It is more likely that [juror number eight] knew disclosure was the appropriate response to the court's questions, yet deliberately construed them as narrowly and subjectively as possible so as to avoid having to reveal that he was a former police officer."[22]

Here, in contrast to Cho, there is no evidence that McLean deliberately concealed her past connection with the deputy prosecutor to increase the likelihood of being seated on the jury. She truthfully answered all questions on voir dire, and her testimony shows that, although she found the jury selection process "fascinating," she did not believe that her previous contact with the deputy prosecutor would interfere with her ability to decide the case impartially. McLean also testified that she believed counsel would have pursued the topic on voir dire if it had been relevant. She did not have any reason, based on her past

[20] Cho, 108 Wn. App. at 320.
[21] Cho, 108 Wn. App. at 326.
[22] Cho, 108 Wn. App. at 328.

experiences, to believe that disclosure was the appropriate response to the court's questions. In sum, the exceptional circumstances in Cho are not present here.[23]

As for McLean's comments during deliberations, the record shows that McLean testified only that she "possibly" mentioned it and that she was not able to recall any specific conversations. Still, "[w]here the record demonstrates that the undisclosed information is later employed in the jury's deliberations, additional analysis is required."[24] "When a juror withholds material information during voir dire and then later injects that information into deliberations, the court must inquire into the prejudicial effect of the combined, as well as the individual, aspects of the juror's misconduct."[25] Here, it appears from the court's oral ruling that it only examined the prejudicial effect of McLean's purported nondisclosure, and not the prejudicial effect of McLean's potential injection of undisclosed information into deliberations.

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[23] We further observe that the Cho court stated in a footnote that a presumption of implied bias can arise under the following circumstances: "'Some examples might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction.'" Cho, 108 Wn. App. at 325 n.5 (quoting Smith v. Phillips, 455 U.S. 209, 222, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982) (O'Connor, J., concurring)). Again, these factual circumstances are not present here, as McLean only provided child care for the deputy prosecutor on two or three occasions.

[24] State v. Johnson, 137 Wn. App. 862, 868-69, 155 P.3d 183 (2007) (citing State v. Briggs, 55 Wn. App. 44, 53, 776 P.2d 1347 (1989)).

[25] Johnson, 137 Wn. App. at 869 (emphasis added) (citing Briggs, 55 Wn. App. at 53).

But the nature of McLean's possible comments and their attenuated relationship to the central issues at trial render the injection of this extraneous information harmless. "Juror misconduct involving the use of extraneous evidence during deliberations will entitle a defendant to a new trial if there are reasonable grounds to believe the defendant has been prejudiced."[26] "This is an objective inquiry into whether the extraneous evidence could have affected the jury's determinations, and not a subjective inquiry into the actual effect of the evidence," and includes "consideration of the purpose for which the extraneous evidence was interjected into deliberations."[27] "'[A] new trial must be granted unless it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict.'"[28]

Citing State v. Johnson,[29] Livermore suggests that McLean's injection of undisclosed information was prejudicial. But the nature of the juror's comments in that case and the relevance of those comments to the central issue at trial make Johnson inapposite. There, Johnson was charged with multiple counts, including first degree attempted rape, and a juror failed to disclose during voir dire that her daughter had been the victim of "date rape."[30] During deliberations,

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[26] Briggs, 55 Wn. App. at 55 (citing State v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968)).

[27] Briggs, 55 Wn. App. at 55-56.

[28] Briggs, 55 Wn. App. at 56 (alteration in original) (internal quotation marks omitted) (quoting United States v. Bagley, 641 F.2d 1235, 1242 (9th Cir. 1981)).

[29] 137 Wn. App. 862, 155 P.3d 183 (2007).

[30] Johnson, 137 Wn. App. at 866.

she told other jurors in a "lively debate" that they "wouldn't understand" unless they had had the experience of their daughters being the victims of rape or attempted rape.[31] The jury convicted Johnson, and he appealed the trial court's denial of his motion for a new trial.[32] After finding the juror's misconduct prejudicial, the Johnson court remanded for a new trial, stating, "Objectively, it seems that her comment was injected to generate sympathy for the victim, a witness in this case. Regardless of purpose, it seems quite likely that her comment gave greater credibility and sympathy to the witness."[33]

Here, any comment McLean may have made about caring for the deputy prosecutor's child does not have similar relevance to the central issues at Livermore's trial. In addition, any comments were offered in a discussion about the jury selection process during a break in deliberations. Objectively, it is highly unlikely that these possible comments enhanced the deputy prosecutor's credibility or affected the jury's determination. We conclude beyond a reasonable doubt that McLean's possible comments did not contribute to the verdict.

Prosecutorial Misconduct

Livermore asserts that the deputy prosecutor committed prosecutorial misconduct by failing to inform the court about her connection with McLean. To support this argument, Livermore cites Williams v. Taylor[34] and Williams v.

[31] Johnson, 137 Wn. App. at 866.
[32] Johnson, 137 Wn. App. at 867.
[33] Johnson, 137 Wn. App. at 870.

Netherland.[35] In the Williams cases, juror Bonnie Stinnett intentionally failed to answer several material questions during voir dire.[36] In particular, she did not respond to questions about whether she was related to any prospective witness or whether she or an immediate family member had been represented by any of the attorneys involved in the trial.[37] Consequently, she failed to disclose that one of the prosecution's witnesses, a longtime law enforcement officer, was her former husband and the father of her four children and that one of the prosecutors had been her attorney in the divorce proceedings.[38] The jury, with Stinnett as the jury foreperson, subsequently convicted Williams of two capital murders.[39]

On review before the United States Supreme Court, Williams argued that he had developed a sufficient factual basis for his juror misconduct and prosecutorial misconduct claims.[40] The Court agreed,[41] and, on remand, the district court held that Williams's right to an impartial jury had been violated because, among other things, the prosecutors had committed misconduct.[42] Specifically, the district court pointed out that the Virginia Rules of Professional Responsibility "required the prosecutors to promptly inform the Court of any juror

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[34] 529 U.S. 420, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000).
[35] 181 F. Supp. 2d 604 (E.D. Va. 2002).
[36] Netherland, 181 F. Supp. 2d at 606.
[37] Netherland, 181 F. Supp. 2d at 606.
[38] Netherland, 181 F. Supp. 2d at 606.
[39] Netherland, 181 F. Supp. 2d at 605.
[40] Taylor, 529 U.S. at 440.
[41] Taylor, 529 U.S. at 440.
[42] Netherland, 181 F. Supp. 2d at 618-19.

misconduct, especially if it involved bias. DR7-107(F). That duty included a duty to report inaccurate or misleading statements by a potential juror."[43] The court also observed that "'[t]he responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.'"[44] Because both prosecutors knew of Stinnett's marriage to the witness and their subsequent divorce and remained silent when Stinnett gave inaccurate answers on voir dire, the court concluded that the prosecutors' actions were inconsistent with their professional obligations and deprived Williams of due process.[45]

Here, unlike in Williams, McLean responded truthfully to all questions. In addition, the applicable Washington Rules of Professional Responsibility did not require the deputy prosecutor to inform the court of her past connection with McLean under the circumstances of this case, especially if there was no reason to believe that McLean was biased.[46] The deputy prosecutor did not commit misconduct.

Denial of Challenge for Cause and Use of Peremptory Challenges

Livermore makes two arguments with respect to juror 25. He argues that the trial court erred in failing to excuse juror 25 and that this error forced him to use a peremptory challenge, violating his right to a fair jury trial under the state

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[43] Netherland, 181 F. Supp. 2d at 618.

[44] Netherland, 181 F. Supp. 2d at 618 (quoting Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 803, 107 S. Ct. 2124, 95 L. Ed. 2d 740 (1987)).

[45] Netherland, 181 F. Supp. 2d at 618-19.

[46] See former RPC 3.8 (2008).

constitution.

We first address whether the trial court erred in failing to excuse juror 25 for cause. We review a trial court's denial of a juror challenge for cause under a manifest abuse of discretion standard.[47]

Juror 25 raised her hand when the trial court asked if anyone believed they could not be fair and impartial. She explained to the deputy prosecutor that she could not be impartial because she had two small children. But when asked if she could "listen fairly to decide the facts," she answered, "I could try, but I can't promise." Defense counsel asked juror 25 again whether she was unable to be impartial because she had two small children, and she agreed. He then asked, "And so I guess what I'm hearing you say is that because you have children—understandably, a lot of emotions come up with this nature of this case. You don't think you could separate that out . . . and be fair to Mr. Livermore?" The juror responded affirmatively, speaking over counsel. The following colloquy then took place between the court and juror 25:

> THE COURT: All right. Kind of again the same questions. I mean there's probably a lot of jurors here—probably [a] majority of the jurors that have children, maybe not small children but have children. Is it something that you just don't think you can set aside and listen to the testimony?
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> JUROR 25: Honestly, I don't know. I could try, but right now my opinion is that I couldn't.
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> THE COURT: Is it the emotional part of just listening to the testimony or—

[47] Noltie, 116 Wn.2d at 838.

> JUROR 25: Yes.
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> THE COURT: —in judging the truth or falsity of testimony?
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> JUROR 25: I—I think listening to the testimony.
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> THE COURT: All right. So I'm not hearing it's bias one way or the other. You're willing to keep an open mind and listen to the testimony?
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> JUROR 25: Yes.
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> THE COURT: Okay. How—you know, I'm exploring this because I'm sure everyone here has certain—a certain feeling of, you know, just the allegations in this case or something that they may not want to listen to, you—whether they're true or not. So I hesitate to excuse people just for that because it seems like everybody can raise their hands and say, I don't want to hear this case either. And . . . if I asked for jurors that really want to serve on this type of a case [I] probably wouldn't get any hands. So that's what I'm trying to decide, is it something—I don't want to pry in private matters. Is there something that would really affect you more so than the average juror?
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> JUROR 25: No.
>
> THE COURT: Okay. I'm not going to excuse her for cause.

While some of juror 25's responses are equivocal, "[e]quivocal answers alone do not . . . require that a juror be removed when challenged for cause."[48] "The question is whether a juror with preconceived ideas can set them aside."[49] "The trial judge is best situated to determine a juror's competency to serve impartially [because the judge] is able to observe the juror's demeanor and, in light of that observation, to interpret and evaluate the juror's answers to determine whether

[48] State v. Rupe, 108 Wn.2d 734, 749, 743 P.2d 210 (1987).

[49] Rupe, 108 Wn.2d at 749 (citing Patton v. Yount, 467 U.S. 1025, 1039, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984); Gosser, 33 Wn. App. at 434).

the juror would be fair and impartial."[50]

Here, juror 25's answers indicate that she believed it would be emotionally difficult for her to hear testimony about child sexual abuse because she had children. But she stated, upon further questioning by the court, that this difficulty would not prevent her from "judging the truth or falsity of testimony." She further agreed that she could "keep an open mind and listen to the testimony." In refusing to excuse juror 25 for cause, the trial court had the opportunity to evaluate these responses while observing juror 25's demeanor. The court did not manifestly abuse its discretion in denying Livermore's challenge for cause.

Livermore next argues that forcing him to use a peremptory challenge to remove juror 25 exhausted his peremptory challenges and thereby violated his state constitutional right to a fair and impartial jury trial.

The Washington Constitution guarantees criminal defendants the right to a fair and impartial jury.[51] This right under the state constitution is not broader than the federal right to an impartial jury.[52] In State v. Fire, our Supreme Court held that "'[s]o long as the jury that sits is impartial, the fact that the defendant

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[50] Rupe, 108 Wn.2d at 749 (citing Patton, 467 U.S. at 1038; Briley v. Bass, 750 F.2d 1238, 1246 (4th Cir. 1984); Gosser, 33 Wn. App at 434).

[51] Wash. Const. art. I, § 22.

[52] Fire, 145 Wn.2d at 164-65 ("[S]ince no Washington case states that the Washington constitution contains a more expansive right to an impartial jury than does the federal constitution, the United States Supreme Court remains the controlling authority on this issue."). This defeats Livermore's argument that an analysis under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), is appropriate.

had to use a peremptory challenge to achieve that result'" does not violate the right to a fair and impartial jury.[53] Because Livermore has not shown that any of the sitting jurors were biased and should have been removed for cause, no violation of his right to an impartial jury occurred.

Statement of Additional Grounds

In his statement of additional grounds, Livermore challenges the calculation of his offender score. He claims that the court erred because the "six counts are the same criminal conduct." The State, however, points out that Livermore's six offenses were against three separate victims. The State conceded that the multiple counts for each victim merged as the same criminal conduct. However, because Livemore's committed crimes against three separate victims, three offenses cannot be considered the "same criminal conduct."[54] Because Livermore has not shown any basis to challenge the correctness of the calculation of his offender score, he is not entitled to relief.

CONCLUSION

Livermore's assignments of error lack merit. Because the court did not admonish prospective jurors and no evidence shows that the venire was

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[53] Fire, 145 Wn.2d at 162 (quoting State v. Roberts, 142 Wn.2d 471, 518, 14 P.3d 713 (2000)).

[54] RCW 9.94A.589(1)(a) states that for separate offenses to constitute the same criminal conduct, three elements must be present: (1) the same criminal intent, (2) the same time and place, and (3) the same victim. If any element is missing, the offenses are counted separately. State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997); State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

intimidated, the court's comments were proper. The court also correctly held that juror McLean did not commit misconduct since she truthfully answered all questions on voir dire and any possible comments that she may have made to other jurors about her contact with the deputy prosecutor did not involve the central issues at trial. Nor did the deputy prosecutor commit misconduct by failing to inform the court of this connection because she had no reason to believe that McLean was biased. With respect to juror 25, the court did not err in denying Livermore's challenge for cause since she stated that she could be impartial. Under Fire, the court's denial did not violate Livermore's right to an impartial jury. Finally, Livermore has not shown any error in the calculation of his offender score.

Affirmed.

Leach, J.

WE CONCUR:

Dwyer, C.J.

Mayer, J.P.T.